

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No. 38 of 2004
In
CIVIL APPLICATION No. 9 of 2004
In
COMPANY APPLICATION No. 139 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG
HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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SHREEJI INDUSTRIAL LTD. - Appellant(s)
Versus
ION EXCHANGE FINANCE LTD. - Opponent(s)

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Appearance :

MR RC JANI for Petitioner No(s).: 1.
NANAVATI & NANAVATI for Respondent No(s).: 1.

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CORAM :HONOURABLE MR.JUSTICE R.S.GARG
HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date : 07/07/2005

ORAL JUDGMENT

1- O-OJA-38-2004-Y-2

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. In this O.J. Appeal, the appellant is challenging the order dated 16.7.2004 passed by the learned Single Judge on Civil Application No. 9 of 2004 in Company Application No. 139 of 2002 whereunder the learned Single Judge has rejected the Company Application seeking stay of the proceedings and further directing that steps in accordance with the earlier orders be taken.
2. Short facts necessary for proper disposal of the present appeal are that ION Exchange Finance Ltd., filed Company Petition No. 302 of 1997 under Sections 433 and 434 of the Companies Act, 1956, seeking winding up of the appellant firm namely M/s. Shreeji Industries Ltd. The petition was ordered to be admitted on 22.9.1999 and publication of advertisement was deferred. However, on 31.7.2000, order for publication of the advertisement was made. Thereafter, the matter was adjourned from time to time. The learned Company Judge recorded that during the intervening period, the Company made certain payments to the creditors. However, on 18.3.2002, the Court appointed Provisional Liquidator for the appellant Company and enjoined the Directors, servants and agents of the Company from disposing of any of its assets movable or

immovable without prior permission of the Court. The Official Liquidator was required to carry out inventory of the assets of movable as well as immovable. Thereafter, the Company made Company Application No. 139 of 2002, wherein it proposed payment of the dues of ION Exchange Finance Ltd. The Court, by its order dated 9.5.2002 clarified that the Official Liquidator attached to the Court who had been appointed as Provisional Liquidator of the Company shall only carry out the inventory of all the assets of the said Company and place his report on record without taking possession of any of the properties. This, in fact, was done in view of the assurance given by the present appellant that the dues of ION Exchange Finance Ltd., would be paid in accordance with the Scheme provided by them. Before anything further could be done, the present appellant - M/s. Shreeji Industries Ltd., submitted Civil Application No. 9 of 2004 submitting inter alia, that as they have already approached the Board of Industrial & Finance Reconstruction (BIFR) on 16.8.2002, further proceedings in the present matter be stayed. The application was opposed by the original petitioner and the Court, after taking into consideration the conduct of the present appellant, rejected the application. Being

aggrieved by the said order dated 16.7.2004, the appellant is before this Court.

3. Learned counsel for the appellant submits that once an application is submitted to the BIFR, the proceedings in the Company Court have to be stayed even if during pendency of the Company Petition in the said proceedings, the Company had prayed for time to make payment of the amount due. His submission is that even after the order of winding up is passed, if the Company goes to the BIFR, then, the proceedings before the Company Court are obliged to be stayed. He has placed reliance on the judgment of the Apex Court in the matter of **M/s. Rishabh Agro Industries Ltd., Vs. P.N.B. Capital Services Ltd., reported in AIR 2000 Supreme Court 1583.**

4. Learned counsel for the respondent M/s. ION Exchange Finance Ltd., referring to the application of the Company submitted to the BIFR, submitted that in reply to question no. 12, the Company informed the BIFR that no Official Liquidator/Receiver had been appointed in any winding up petition. He also submits that the application was submitted to the BIFR on 16th August, 2002 and much before that date, the Company Petition was admitted for hearing and Provisional Liquidator was appointed and the present

appellant, after praying for time and playing fraud upon the BIFR, made an application. His submission is that under such circumstances, the Company Court was absolutely right in rejecting the application. So far as the submission of the application to the BIFR on 16th August, 2002 is concerned, the fact is not disputed. The appellant also does not dispute the details and information given in the said application. It is further submitted that the said question will have to be considered by the BIFR, but the Company Court cannot proceed further in the matter.

5. In the matter of M/s. Rishabh Agro Industries Ltd., the Supreme Court had occasion to consider almost identical question. The Supreme Court had observed in para-10 as under:-

"10. It has been further suggested on behalf of the respondent - bank that the action of the appellant was mala fide inasmuch as it sought time from the Court to make the payment of the amount due and after seeking indulgence mala fidely made the reference to the BIFR on 30th September, 1997. It is contended that after the order of the winding up and appointment of the Liquidator, the Board of Directors had no jurisdiction to move the BIFR by passing a resolution. Such a submission cannot be accepted. In a winding up petition the Liquidator is appointed to protect the assets of a company for the benefit of its creditors, secured and unsecured and others. It is not the function of the Official Liquidator to start the process of rehabilitation of the comply as is aimed at under the Act. Despite appointment of the

Official Liquidator, the Board of Directors continue to hold all residuary powers for the benefit of the company which includes the power to take steps for its rehabilitation. The Board of Directors in the instant case were not in any way by any judicial order debarred from taking recourse to the provisions of the Act for the purposes of rehabilitation of the company. If there existed a power, its exercise cannot be termed to be mala fide only because it was initiated after availing the opportunity to make the payment of the amounts due and passing of the order of winding up of the company.

It may also be noticed that winding up order passed under the Companies Act is not the culmination of the proceedings pending before the Company Judge but is in effect the commencement of the process. The ultimate order to be passed in such a petition is the resolution of the company in terms of Section 481 of the Companies Act. The words "shall be deemed to commence" in Section 441 of the Companies Act clearly show the intention of the legislature that although the winding up of a company does not in fact commence at the time of presentation of the petition itself but it shall be presumed to commence from that stage. The word "deemed" used in the Section would thus mean, "supposed", "considered", "construed", "thought", "taken to be" or "presumed".

From the above quoted passage from the judgment of the Supreme Court, it would clearly appear that even after the Company Petition is admitted, the petition has been advertised, Official Liquidator has been appointed, the Board of Directors of the Company still have a right and authority to approach the BIFR. If the said right is intact, then legal consequences under the provisions of Section 15 and other relevant provisions of Sick

Industrial Companies (Special Provisions) Act (1 of 1986) shall apply. One of the consequence would be that so long as the application is pending consideration with the BIFR, the proceedings against the Company shall remain suspended. The order dated 16.7.2004 passed in Civil Application No. 9 of 2004 in Company Petition No. 302 of 1997 is hereby set aside.

6. At this stage, learned counsel for the appellant submits that the BIFR has passed a final order in relation to the rehabilitation of the Company, therefore, this Court should take note of that also. In our considered opinion, if during pendency of this proceedings, BIFR has passed an order, then, the appellant is required to bring the said order to the notice of the learned Company Court for further action.

[R.S.GARG, J.]

[RAVI R. TRIPATHI, J.]

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